

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

Case No. 8:08-cr-330-T-30TBM

JOHN ROBERT MILLER

**UNITED STATES' UNOPPOSED
MOTION TO CONTINUE SENTENCING HEARING**

The United States of America, by United States Attorney A. Brian Albritton, hereby files this Unopposed Motion to Continue Sentencing Hearing. The sentencing hearing is currently scheduled for January 13, 2009, at 8:45 a.m. The government respectfully requests a continuance of six weeks, with the understanding that a further continuance may be required. In support of this motion, the government states as follows:

1. On December 19, 2008, a panel of the Eleventh Circuit Court of Appeals granted a writ of mandamus requested by certain Coast Bank borrowers in the companion case of United States v. Philip William Coon, Case No. 8:08-cr-441-T-17MAP (Eleventh Circuit Court Case No. 08-16753-G). (Doc. 37) The panel determined that “[b]ecause the criminal activity directly and proximately harmed petitioners, they are victims and enjoy the rights the CVRA creates.” (Id. at 10.)
2. The government intends to request that the Eleventh Circuit panel rehear the matter. The government has been advised that defendant Coon also plans to

request some level of rehearing. Assuming such requests for rehearing are filed, the government does not know when to expect further ruling from the Eleventh Circuit Court of Appeals.

3. Despite the anticipated requests for rehearing, the government has already started working to complete multiple tasks required by virtue of the existing Eleventh Circuit ruling and to properly prepare for the sentencing hearing before this Court. Those tasks include, but are not limited to, the following: (1) identifying all borrowers whose Coast Bank loans were subject to a two-point loan origination fee charged by American Mortgage Link; (2) entering the names and mailing addresses of all such borrowers into the government's Victim Notification System ("VNS"); (3) preparing and mailing VNS notices, along with Victim Impact Statement Forms, concerning this case and the companion case to all such borrowers; (4) assembling and reviewing all of the documentation needed to determine the monetary amounts of the two-point loan origination fees associated with the subject loans; (5) reviewing all correspondence and/or substantiating documentation provided by borrowers in response to the VNS notice; and (6) compiling a proposed restitution schedule, along with related documentation, for the Court to consider at the sentencing hearing and ultimately to append to the Judgment and Commitment Order.

4. The government is also investigating the available options, and procedures associated with such options, for using the proceeds of any forfeitures for purposes of restitution. It appears that one such option is for the government to abandon any right to forfeiture recognized in the plea agreement, so that those assets

identified as substitute assets in the plea agreement may be liquidated and used for restitution. This option obviates the necessity of securing the approval of the Department of Justice's Asset Forfeiture and Money Laundering Section ("AFMLS") associated with other options discussed below. This option, however, also precludes the use of Assets Forfeiture Fund monies to pay the costs associated with the liquidation of such substitute assets and other costs associated with using forfeited assets to provide restitution. See 28 U.S.C. § 524(c)(1)(A); see also The Attorney General's Guidelines on Seized and Forfeited Property (July 1990, amended November 2005), Ch. VII B "Payments and Reimbursements" and Ch. VII D(1)(e) "Limitations on Use of the Fund" (Items not payable from the Assets Forfeiture Fund include "[e]xpenses in connection with the seizure, detention and disposition of property where the seizure was effected for debt collection or other non-forfeiture purposes." (emphasis added)).¹

Another option is known as remission. See 28 C.F.R. Part 9. Once assets have been judicially forfeited, the authority to distribute them to victims rests solely with the Attorney General, pursuant to the regulations governing the remission of forfeitures at 28 C.F.R. Part 9. The authority to decide individual petitions for remission has been delegated by the Attorney General to the Chief of AFMLS. A petition for remission may be granted if the victim satisfactorily demonstrates that (1) a pecuniary loss of a specific amount has been directly caused by the criminal offense, or related offense, that was

¹ The "Limitations on Use of the Fund" section of The Attorney General's Guidelines on Seized and Forfeited Property (July 1990, amended November 2005) is attached hereto as Exhibit A.

the underlying basis for the forfeiture, and the loss is supported by documentary evidence including invoices and receipts; (2) the pecuniary loss is the direct result of the illegal acts and not the result of otherwise unlawful acts that were committed in the course of the criminal offense; (3) the victim did not knowingly contribute to, participate in, benefit from, or act in a willfully blind manner toward the commission of the offense, or related offense, that was the underlying basis for the forfeiture; (4) the victim has not in fact been compensated for the wrongful loss of the property by the perpetrator or others; and (5) the victim does not have recourse reasonably available to other assets from which to obtain compensation. See 28 C.F.R. § 9.8(a).

The third option is known as restoration, a new and simplified procedure initiated in 2002 to accelerate the return of forfeited property to victims. The authority to grant restoration has been delegated to the Chief of AFMLS. Before restoration may be granted, a court must enter both a restitution order and an order of forfeiture. Further, the United States Attorney must inform AFMLS in writing that (1) all known victims have been properly notified of the restitution proceedings and are properly accounted for in the restitution order; (2) the losses described in the restitution order have been verified by the seizing agency (not just the probation office) and reflect all sources of compensation received by the victims; (3) the victims do not have recourse reasonably available to other assets from which to obtain compensation for their losses; and (4) the victims did not knowingly contribute to, participate in, benefit from, or act in a willfully blind manner toward the offense or related offense. See Forfeiture Policy Directive 02-1: Guidelines and Procedures for Restoration of Forfeited Property to Crime Victims via Restitution in Lieu of Remission (November 25, 2002).

The government has not yet determined which forfeiture/restitution option it believes would be most appropriate in this case. Nevertheless, the government wanted the Court to have an idea of the time and tasks each option will require and what the government must do to prepare for each option. Regardless of which option is utilized, the prerequisites to the use of proceeds of forfeitures for restitution necessitates a continuance of the sentencing hearing.

5. The government anticipates that it will take at least six weeks to effectuate the required notifications to borrowers, perform all of the work required to prepare for the entry of a restitution order at sentencing and, if appropriate, lay the groundwork required to use the proceeds of any forfeitures for restitution, and it is certainly possible that more time will be required to do so.

6. The timing of a sentencing hearing also may be impacted either by any effort by a defendant to withdraw from the plea agreement in this case (or the companion case) or any effort by the borrowers to invalidate either or both plea agreements. See Case No. 8:08-cr-441-T-17MAP at Doc. 35, page 6 (“the victims are currently considering whether they should move to have the plea agreement invalidated . . .”).

7. The government has consulted with defendant Miller’s counsel, Eduardo Suarez, about this motion. Mr. Suarez has no objection to the requested continuance.

CONCLUSION

For all of the foregoing reasons, the United States respectfully requests that the Court grant this unopposed motion to continue the sentencing hearing and reschedule the sentencing for a new date in March 2009, with the understanding that a further continuance may be required.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Eduardo Suarez, Esquire
James E. Felman, Esquire
Marcelino J. Huerta, III, Esquire
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